In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-967

PETER DiPIRO,
PETITIONER,

v.

JAMES L. TAFT, MAYOR, CITY OF CRANSTON;
EARL CROFT, DIRECTOR OF PERSONNEL,
CITY OF CRANSTON;
THOMAS POWERS,
RESPONDENTS.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit.

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CITY OF CRANSTON;
THOMAS POWERS,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Peter DiPiro, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 22, 1978,

Opinion Below.

The opinion of the Court of Appeals for the First Circuit, not yet reported, appears in the appendix hereto (App. A, 1a-6a). No opinion on plaintiff's federal constitutional claims was rendered by the United States District Court for the District of Rhode Island.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 22, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner claims he was denied rights secured to him under the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> SECTION 1. *Citizens of the United States.*
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

> SECTION 1983. *Civil action for deprivation of rights.*
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Question Presented.

Whether the "policymaking-nonpolicymaking" rule of *Elrod* v. *Burns*, 427 U.S. 347 (1976), is applicable in an employment discrimination case based upon the First and Fourteenth Amendments involving persons and positions pro-

tected by a civil service merit system? The First Circuit ruled that *Elrod*'s "policymaking-nonpolicymaking" rule was applicable to a person and position protected by a civil service merit system.

Statement of the Case.

This action was commenced in the United States District Court for the District of Rhode Island, pursuant to 42 U.S.C. § 1983. Plaintiff's complaint sought damages and equitable relief for the deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution.

In January, 1975, the position of Fire Chief of the City of Cranston became vacant when the then Fire Chief retired. The Fire Chief's position is a classified position within the civil service merit system of the City of Cranston and promotions to that position are made by the respondent Mayor after competitive examinations are completed and the three highest eligible applicants are so certified.

Cranston's civil service law provides that all promotions made by the appointing authority within the civil service merit system are to be based solely upon merit and fitness, to be ascertained as far as is practicable by competitive examinations (Ex. 4, Tr. 123),[1] and the Cranston City Home Rule

[1] Rule V of the City of Cranston Rhode Island Civil Service Rules and Regulations provides:

> *Examinations*, 1. *Competitive Examinations:* All appointments and promotions in the classified service of the City shall be made according to merit and fitness to be ascertained so far as practicable by competitive examination. Examinations shall relate to those matters which will test fairly the capacity and fitness of the candidates to discharge efficiently the duties of the classes for which the examinations are held.

Charter prohibits discrimination in its civil service on the basis of political affiliations (Ex. 12, Tr. 319).[2]

The petitioner, Peter DiPiro, was a 25-year veteran of the Fire Department at the time of the vacancy and a Deputy Fire Chief. He sought a promotion to the vacant position. After completing the competitive examinations, the petitioner was notified that he had tied for first place with one William Maine. At the time of the promotion, only petitioner and William Maine were eligible for the promotion. On February 21, 1975, the respondent Mayor James L. Taft selected and promoted William Maine, the candidate with considerably less seniority and experience, to the position of Fire Chief.

The petitioner thereupon commenced this action in the United States District Court for the District of Rhode Island, alleging deprivation of rights under the First and Fourteenth Amendments along with pendent state claims. The petitioner alleged and sought to prove at trial that the Fire Chief promotion made by the respondent Mayor was based upon political considerations and not on merit as required by law, and that said basis was an impermissible motive which denied to the petitioner his rights as secured by the First Amendment and Equal Protection Clause of the Fourteenth Amendment. The gravamen of petitioner's case was that the respondent Mayor was purposefully discriminating for or against certain members of the civil service by conditioning advancement within the service on political loyalty and/or political contributions.

In support of his claim, petitioner introduced *inter alia* evidence at trial which demonstrated that William Maine, the person who had received the promotion instead of petitioner,

[2] The Cranston City Charter and amendments thereto are part of the record below as Exhibits 12 and 13.

had, over the years, been a consistent money contributor to the Mayor and the Mayor's political party (Tr. 247) in direct violation of the merit system rules and regulations (Tr. 347); that the respondent Mayor knew that Maine had been making political contributions to him and his party (Tr. 350) but took no action to remove him from the service as is required by the Charter (Tr. 350); that the respondent Mayor's campaign manager kept a list of "good contributors" which included several firemen within the civil service (Tr. 467), including William Maine; that most of the firemen on the "good contributors" list had recently received promotions the first time they became eligible (Exs. 18-22, Tr. 399-401, 478-489); that the respondent Mayor was responsible for the solicitation of certain people on the "good contributors" list, including William Maine, in direct violation of civil service provisions of the City's Charter (Ex. 12, Tr. 366); that immediately prior to the promotion, William Maine solicited a political contribution from the petitioner for a political function being held on behalf of the respondent Mayor, but petitioner refused the request[3]; and that the Personnel Director, respondent Croft, although occupying a civil service position was also on the Mayor's "good contributors" list (Ex. 15). Other circumstantial evidence of intent was offered to prove a pattern and practice of discriminatory promotions. The respondents, of course, introduced evidence which was intended to support their claim that the promotion was based upon neutral evaluations of the respective candidates and was not discriminatory. (*See*, App. A, 3a.) *These factual disputes and questions are not relevant to the legal issue presented to this Court except to the extent that they may be looked at to assess the evidentiary*

[3]The District Court excluded this evidence and it is in the record as an offer of proof.

sufficiency of petitioner's claim to withstand a directed verdict.

At completion of the case the trial judge, over the petitioner's objection, instructed the jury pursuant to this Court's ruling in *Elrod* v. *Burns*, 427 U.S. 347 (1976), that political considerations and/or criteria were a permissible factor in the respondent's decision to promote if they found the position of Fire Chief to be policymaking. A verdict was returned by the jury in favor of the respondents.

The jury verdict was affirmed by the First Circuit, which held that the District Court's charge on the "policymaking-nonpolicymaking" rule of *Elrod* v. *Burns* was permissible because there was no constitutional distinction under *Elrod* between patronage employees and civil service employees (App. A, 3a).

Reasons for Granting the Writ.

The Decision Below Raises a Substantial and Important Question Concerning the Extent and Applicability of First and Fourteenth Amendment Protections for Civil Service Merit Employees.

The issue in this case is simple and straighforward but of considerable importance in the application of First and Fourteenth Amendment principles to government employees protected by a civil service merit system. It involves a question of the proper interpretation of this Court's decision in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and that case's application of its "policymaking-nonpolicymaking" rule to an employment discrimination claim brought by a member of a civil service merit system.

Stripping the matter of all nonessential facts relative to this petition, the factual basis for the question presented is as follows: Petitioner, Peter DiPiro, instituted an action in the United States District Court for the District of Rhode Island, pursuant to 42 U.S.C. § 1983, seeking relief for the deprivation of constitutional rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, after he was denied a promotion to the position of Fire Chief in the City of Cranston, Rhode Island.

The petitioner alleged and sought to prove at trial that while the position of Fire Chief was clearly within the protection of Cranston's civil service merit system, the respondent Mayor (the appointing authority) had engaged in intentional and purposeful discrimination by basing his decision to promote on political loyalty and other nonmerit factors. Under Cranston's civil service merit system, which is similar in language and intent to the federal civil service system, all promotions within the classified service must be based upon merit and fitness alone, and discrimination on the basis of political affiliations is specifically prohibited. In the District Court, petitioner sought to prove that the respondent Mayor was proselytizing the employees of the civil service by dividing them into two groups. One group was composed of all those civil servants, including William Maine, who actively supported him politically and contributed to his political campaigns. The other group included those, including petitioner, who did not support him politically and did not contribute to his campaigns. It was petitioner's contention that those in the politically supportive group were receiving favored treatment with respect to promotions in the civil service.

The District Court, however, over the objection of the petitioner, instructed the jury, *inter alia*, under this Court's holding in *Elrod* v. *Burns*, 427 U.S. 347 (1976), that:

> Not all personnel decisions made by an officer of Government, authorized to make personnel decisions, and which are made solely or primarily on the basis of political loyalties, are constitutionally invalid. Government employees with only limited responsibility, who are not in a position to thwart the goals of the administration, may not ordinarily be either hired or fired solely or primarily on the basis of their political loyalties. However, it follows that employees who are in a position to thwart the goals of the administration, may be considered on the basis of their political loyalties. This is so in order that the Government may not be undercut by tactics obstructing the implementation of the policies of the administration, which you must presume to have been sanctioned by the electorate. In determining if political considerations may properly enter into a decision whether or not to promote, you must consider whether the position to be filled is a policymaking position. Policymaking positions are those positions in government with responsibilities that are not well defined and are of broad scope and which the employee acts as an advisor or formulates plans for the carrying out of broad goals. The nature of such a position is such that its holder must necessarily affect the public welfare. For example, a clerk typist would certainly not be a policymaking position, while a member of the Cabinet of the President of the United States would clearly be a policymaking position. The defendants have the burden of proof, as I have defined it for you, that the position of fire chief in the City of Cranston is a policymaking position. (Tr. 745-746.)

On appeal to the First Circuit, the appellate court described the legal controversy and issue with some clarity:

DiFiro complains that the court incorrectly relied on *Elrod* v. *Burns*, 427 U.S. 347 (1976), in charging the jury. He claims that the court should not have informed the jury that, should it find the position of fire chief a policy making one, then the mayor would be permitted to take political affiliation into consideration in choosing from the top three candidates. The pertinent passage from *Elrod* reads:

> A second interest advanced in support of patronage is the need for political loyalty of employees, . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the . . . administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. *Limiting patronage dismissals to policy making positions is sufficient to achieve this governmental end.*

Id. at 367 (emphasis added.) Appellant claims that, since the position at issue is a civil service one which turns on merit, the *Elrod* allowance of patronage appointments to policy making positions is inapplicable. However, *Elrod* affords no constitutional basis for distinguishing between civil service and non-civil service employment. It simply holds that the first amendment prohibits political considerations in the case of non-policy making employees, but not in the case of policy making employees. The challenged instruction was consistent with the law as the Supreme Court has stated it thus far. (App. A, 2a-3a.)

These rulings by the courts below on the *Elrod* issue deprived petitioner of an opportunity to establish his claim of

constitutional deprivation, since his entire case was premised upon the theory that political favoritism was an impermissible motivating factor in the decision to promote. In effect, the Circuit Court has ruled that this Court's First Amendment rulings, and specifically the policymaking-nonpolicymaking rule of *Elrod* v. *Burns*, *supra*, can now be used to diminish or eliminate the protection afforded persons and positions by civil service merit laws.[4] In other words, the decision below permits advancement within the civil service to be conditioned upon political performance if it can be established that the position being sought is a policymaking one.[5]

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[4] Unfortunately for petitioner, the remainder of the Circuit Court's opinion sets out, in dicta, an unfair and strictly one-sided statement of the evidence in relation to plaintiff's claim. The Circuit Court states that there was "no evidence" to support plaintiff's claims (App. A, 4a *n.* 2), and goes on to make what petitioner believes are other erroneous statements of law relative to the case. (*See*, petitioner's Motion for Correction and/or Modification of Opinion, App. B, 7a-16a). The "no evidence" statement by the court was originally the result of the court's conclusion in footnote 2 of the slip opinion that petitioner had "failed to comply" with Rule 10(b) of the Federal Rules of Appellate Procedure. The Circuit Court was clearly wrong on this matter and upon petitioner's Motion for Correction and/or Modification of the Opinion (App. B, 7a-16a), the Circuit Court while not explicitly confessing error, eliminated footnote 2 from the published opinion (App. C, 17a-18a). The unfortunate part is that the Circuit Court did not correct the distinctly unfair and erroneous impression it left concerning the evidentiary merit of plaintiff's case. Notwithstanding the Circuit Court's opinion, plaintiff presented ample evidence to support his claims (*see*, Statement of the Case, *supra at* 5, 6) and can set it out in detail if it becomes necessary to do so. *The important point to make is that the District Court's charge to the jury on the Elrod issue permitted the jury to reach its decision on at least one impermissible basis. Under these circumstances, the rule of this Court is that a new trial is required. See, e.g., Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19, 29-30 (1962).

[5] Although civil service employees are protected by statute and regulations, it is beyond dispute that they also retain their constitutional guarantees. The fact that civil servants possess rights under state or local laws does not diminish their right to vindicate federal constitutional rights under 42 U.S.C.

The decision below is an alarming precedent and has ominous consequences for every individual who is employed in government service under the protection of a civil service merit system.[6] Even if a governmental position is clearly within the protection of a civil service merit system, under the decision below, an appointing authority can use political considerations or political criteria in his decision to promote if he can establish that the position is policymaking. The potential effect of this rule of law on many government employees in the civil service is considerable. Moreover, the decision most affects and penalizes those who, like the petitioner, have devoted their entire working lives to government service, for the closer one gets to the top echelon of government service positions, the easier it will be to say that the position is policymaking.

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§ 1983 since the federal remedy is supplementary to any state remedy, *see*, *Monroe* v. *Pape*, 365 U.S. 167 (1961), *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Moreover, it is often the case that local authorities and personnel boards (who are often controlled by the appointing authority) enforce the merit laws with an uneven hand or not at all, leaving the civil servant with statutory protection in name only. Thus, the constitutional claim becomes the primary means of seeking relief for unlawful political discrimination. Consequently, a claim by a plaintiff that an appointing authority is conditioning advancement within the civil service on the political loyalty and/or political performance of the employee, violates both the First and Fourteenth Amendments by compelling adherence to a particular political ideology (*i.e.*, penalizing neutrality); *see, e.g.*, *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and the equal protection guarantee against purposeful discrimination. *See, e.g.*, *Snowden* v. *Hughes*, 321 U.S. 1 (1944); *Davis* v. *Passman*, 544 F. 2d 865 (5th Cir. 1977), *reversed en banc on other grounds*, 571 F. 2d 793 (5th Cir. 1978), *cert. granted*, 47 U.S.L. Week 3301 (1978).

[6]Every state in the Union has a merit system or "little Hatch Act" patterned generally after the federal Hatch Act, *see*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 604-605 *n.*2 (1973). There are also innumerable "little Hatch Acts" in force and effect in the various cities and towns throughout the country.

The decision below is simply wrong[7] and has consequences far beyond the particular result of this case. It equates and gives similar First and Fourteenth Amendment protections to patronage and civil service employees. It is surprising, to say the least, to find that *Elrod* is being relied upon as precedent for that conclusion. This Court in *Elrod* took great pains to distinguish patronage employees from those employees protected by a civil service system as found in *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Elrod* v. *Burns*, *supra* at 353, 354. The decision below now turns this Court's decisions in *Elrod* and *Letter Carriers* on their heads by saying that, as far as the constitutional rule of law is concerned, civil service merit employees can be dismissed or appointed on the same basis as patronage employees if it can be proven that the position they seek or occupy is policymaking; the only distinctive criterion to determine First Amendment protections now being whether the position is policymaking. Did *Elrod* intend this result? Or, as petitioner contends, did *Elrod* intend to state a constitutional rule of law for patronage employees only, *i.e.*, the First Amendment does not prohibit the dismissal of patronage em-

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[7]Petitioner recognizes that this Court cannot correct every wrong decision in the lower federal courts simply because it is wrong. This case, however, apart from establishing an erroneous constitutional rule of law which can affect and have serious consequences in many other similar situations as set out above, works a particular and bitter injustice for petitioner, a civil servant who has devoted his entire working life to government service. The rulings of the lower courts on the *Elrod* issue have not only deprived petitioner of a fair and equitable chance to establish his claim of political interference and purposeful discrimination in the appointment process, but are now forming the basis of a claim for attorney's fees by defendants in the District Court based upon 42 U.S.C. § 1988 (1976) (as amended). (*See*, attached Motion, App. D, 19a). Thus, the rulings of the courts below on the *Elrod* issue, apart from being wrong, are working a mischief that seriously and unfairly burdens petitioner far beyond the injustice of having the substantive issue decided against him.

ployees for political reasons if the position the patronage employee occupies is policymaking?

Unless petitioner seriously misreads *Elrod*, neither the plurality nor the dissenting justices labored under the belief that the policymaking-nonpolicymaking rule would apply to persons and positions protected by a civil service merit system. *See, Elrod, supra*, 427 U.S. at 353-354 (plurality opinion); 427 U.S. at 386-387 *n.*10 (Powell, J., dissenting). It seems almost beyond question that the policymaking-nonpolicymaking rule announced in *Elrod* was adopted to accommodate the "political loyalty" interest advanced in support of the patronage system. *Elrod, supra* at 367. Clearly, "political loyalty" is antithetical to a civil service merit system, *Letter Carriers, supra*, and, therefore, the policymaking-nonpolicymaking distinction is simply irrelevant to First and Fourteenth Amendment employment discrimination claims involving a civil service merit system. Without a "political loyalty" justification argument, it is clear that the First Amendment does prohibit an appointing authority from conditioning advancement within a civil service merit system to any and all protected positions on political loyalty criteria. *United States Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548 (1973); *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Although no other Circuit Court has addressed this issue and thus no conflict exists, the constitutional issue is of such importance to the fair and equitable administration of all civil service merit systems, and the ruling below so clearly wrong, that review is warranted.

This Court should grant certiorari and review this issue. The decision below is a serious misinterpretation of First and Fourteenth Amendment principles as they are applicable to civil service merit employees and upsets nearly 100 years of struggle by government employees to obtain statutory protection from discrimination in employment based upon "compelled belief" in violation of the First and Fourteenth Amendments. *See, Letter Carriers, supra*; *cf. Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). This Court has described these First Amendment issues as going to the very "core of those activities protected by the First Amendment." *Elrod* v. *Burns, supra*, at 356. Moreover, the history and purpose behind the enactment of civil service laws leave little doubt that civil service laws were designed to eliminate precisely the result reached below. *See, Letter Carriers, supra*. It would be an anomalous result indeed if that protection could now be eliminated under the guise of a constitutional rule of law that was intended to apply to patronage employees only. The legislative judgment that civil service laws are necessary to protect certain persons and positions from political influence and corruption cannot be left to the uncertain fate of the decision below. If allowed to stand, the decision below will shake the very foundation of all civil service merit systems and adversely affect literally thousands of government employees who, up until this moment at least, have held the abiding belief that even the top rung of their civil service department was attainable without political interference or coercion being the dominating factor in the decision to promote.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Appendix. A.

United States Court of Appeals
For the First Circuit

No. 78-1087

PETER DiPIRO,

PLAINTIFF-APPELLANT,

v.

JAMES L. TAFT, MAYOR, CITY OF CRANSTON;
EARL CROFT, DIRECTOR OF PERSONNEL,
CITY OF CRANSTON;
THOMAS POWERS,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. FRANCIS J. BOYLE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Ralph J. Gonnella, for appellant.
Joseph A. Kelly, with whom *Carroll, Kelly & Murphy*, was on brief, for appellees.

September 22, 1978

BOWNES, *Circuit Judge*. Plaintiff-appellant, Peter DiPiro appeals from a jury verdict finding that he was not impermissibly denied equal protection of the laws when the Mayor of the City of Cranston, Rhode Island, appointed William Maine rather than DiPiro to the position of fire chief. The complaint was brought pursuant to 42 U.S.C. § 1983. Parties defendant were the Mayor, the Director of Personnel, and a former Fire Chief of the City of Cranston.

The mayor of Cranston is given the authority in the City Charter to appoint the fire chief. When a vacancy is to be filled, the director of personnel is directed to announce and conduct a competitive examination and to certify to the mayor the names of the three persons standing highest on the list of eligible candidates, in the order of their standing. The mayor is then empowered to make his appointment from those three.

Appellant and William Maine tied for first place and were both certified as number one on the list of eligible candidates sent to Mayor Taft by Personnel Director Croft.[1] Taft appointed Maine. Appellant complains that Taft based his decision on political motives rather than merit and that he has, accordingly, been denied equal protection of the laws. On appeal, he asserts that the judge erroneously charged the jury on the applicable law and made several mistaken evidentiary rulings.

DiPiro complains that the court incorrectly relied on *Elrod* v. *Burns*, 427 U.S. 347 (1976), in charging the jury.

[1] The competitive ranking included several factors. One was a written exam on which both DiPiro and Maine received exactly the same score. An oral examination, conducted by three fire chiefs from other cities and towns in Rhode Island, ranked DiPiro and Maine approximately equivalent. However, one of the fire chief examiners contacted Earl Croft, the Director of Personnel, the day following the exam to inform him that he had mistakenly ranked DiPiro twenty points higher than he had intended. He queried whether it would be possible to change his score. He was not permitted to, thereby leaving DiPiro with twenty points to which one of the examiners had determined he was not entitled. The fire chief examiner was not associated or related in any manner with the defendants in this case. Another factor used in determining rank was seniority, limited by the City Charter's directive that no additional seniority credit would accrue after fifteen years of service. DiPiro claims that he should have been ranked higher than Maine, though both had tied for first place, since he had more years in the department than Maine. Personnel director Croft explained that he had given both candidates the maximum allowable seniority credit and, since the City Charter limited further credit for more than fifteen years service, he did not factor DiPiro's additional years.

He claims that the court should not have informed the jury that, should it find the position of fire chief a policy making one, then the mayor would be permitted to take political affiliation into consideration in choosing from the top three candidates. The pertinent passage from *Elrod* reads:

> A second interest advanced in support of patronage is the need for political loyalty of employees, . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the . . . administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. *Limiting patronage dismissals to policy making positions is sufficient to achieve this governmental end.*

Id. at 367 (emphasis added). Appellant claims that, since the position at issue is a civil service one which turns on merit, the *Elrod* allowance of patronage appointments to policy making positions is inapplicable. However, *Elrod* affords no constitutional basis for distinguishing between civil service and non-civil service employment. It simply holds that the first amendment prohibits political considerations in the case of non-policy making employees, but not in the case of policy making employees. The challenged instruction was consistent with the law as the Supreme Court has stated it thus far.

Under the City Charter, the mayor was authorized to select among the top three candidates, which he did. His authority to make such a selection necessarily carried with it considerable discretion to pick and choose on the basis of his own judgment. Mayor Taft testified that the reason he appointed Maine rather than DiPiro was that he felt that DiPiro lacked the managerial skills necessary for effective management of the fire department. Taft also

cited DiPiro's tendency to be a "good guy" rather than a strong leader as a reason for not naming him as fire chief. Taft testified that DiPiro was not the type of person qualified to administer a large department with a million dollar budget. He explained that DiPiro had gone counter to the policies of the mayor and the department on occasion, once testifying in behalf of retaining on the force a fireman who had been convicted of a narcotics offense and once differing on the promotion of a fireman. The mayor felt that appellant might not fully implement the policies of his administration. The retiring fire chief had told Mayor Taft that, in his opinion, Maine would make a better fire chief than DiPiro; Taft stated that he respected the retiring chief's opinion, and that it was an additional factor in his decision. Taft testified unequivocally that he appointed Maine because he was convinced that he would make the better fire chief, and disclaimed making the selection on the basis of a political motive.

There was no evidence[2] which would warrant the finding

[2] We take this occasion to note that appellant has failed to comply with Fed.R.App.P. 10(b), "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion." On at least four occasions, appellant cites to parts of the transcript, which he claims support the proposition being asserted, which are not part of the record on appeal. We refer specifically to Appellant's Brief at footnote 6, where reference is made to page 184 of the transcript. Appellant includes up to page 170, then skips to page 196. We further point to footnote 9, where appellant cites to page 247 of the transcript, while including only parts of the transcript up to page 232, then skipping to page 250. He cites to pages 463 and 464 yet skips from page 445 in the transcript to page 471, eliminating the pages which purportedly would support his statement. Appellant further cites to page 480 of the transcript, yet includes that portion up to page 477, then skips to page 508. Appellant's averments of what the missing part of the record would disclose, in the absence of a stipulation from the parties as to what the record would show, are *not* evidence which will be used by this court to dispute findings by the jury or by the trial court.

of a purposeful and intentional discrimination against DiPiro sufficient to support a finding of unconstitutional deprivation of equal protection of the laws. *See Claudio Bauza* v. *Arturo Morales Carrion*, No. 77-1310, slip. op. at 7-8 (1st Cir. June 20, 1978). The trial judge was more than solicitous toward plaintiff, giving a charge based on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-803 (1973), to the effect that, should the jury find that defendant Taft considered impermissible factors in his promotional decision, the burden of proof would then shift to the defendant to show that he would have selected Maine irrespective of any political considerations. Since it is clear that appellant did not belong to any protected class, this jury instruction provided him more protection than he was legally entitled to.

It must also be noted that the *Elrod* ruling, within the context of this case, was more than was necessary to state the correct standard for evaluating defendant Taft's decision. Taft appointed Maine within the context of a competitive civil service examination setting. DiPiro's protected interest is not of the same calibre as that of plaintiffs' in *Elrod*. He had a protected interest in being allowed to compete for the position of fire chief. He was accorded this right. The mayor, as authorized by the City Charter, selected the final nominee from the top three certified candidates. The jury surely was entitled to find, on the basis of the evidence, that the decision to appoint Maine rather than DiPiro trampled no legally protected right of DiPiro and specifically did not abridge his guarantee to equal protection of the laws.

We have serious doubts as to whether this case warranted submission to a jury. The federal courts are not super personnel boards ordained to reevaluate appointments and dismissals made in the course of state and local government operations. Labelling a firing or hiring unconstitutional does not make it so. There was nothing unfair

or even improper about the mayor of Cranston's appointment of its fire chief.

Upon review, we find no grounds for reversible error in the district court's evidentiary rulings.

The judgment is affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT.

PETER DiPIRO,
PLAINTIFF-APPELLANT

v. C. A. No. 78-1087

JAMES L. TAFT, MAYOR, CITY OF CRANSTON; EARL CROFT, DIRECTOR OF PERSONNEL, CITY OF CRANSTON; THOMAS POWERS
DEFENDANTS-APPELLEES

Motion for Correction and/or Modification of Opinion

The opinion and judgment of the Court in the above-entitled matter were issued on September 22, 1978. It would be an understatement to say that plaintiff/appellant lost the appeal.

Although plaintiff is extremely disappointed in the decision, plaintiff recognizes that the Court does not always see the issues in the same light as an advocate for a particular cause. Plaintiff's attorney expects to lose appeals on particular occasions and, in most cases, without the need from counsel for any further comment, petition, or motion.

Nevertheless, there are statements in the Court's opinion which are simply incorrect as a matter of fact and law, and to

the extent that these incorrect statements reflect upon plaintiff's attorney's ability and reputation as a litigator, they need to be and should be corrected.

Plaintiff's attorney refers initially to footnote two (2) of the Court's opinion. The Court states:

> We take this occasion to note that appellant has failed to comply with Fed.R.App.P. 10(b), . . .

The Court goes on to point out what, in its opinion, appears to be at least four (4) occasions where plaintiff refers to the transcript, but that the references are not part of the "record" on appeal. The fact of the matter is that the Court is incorrect both in its interpretation of Rule 10(b) and in its assertions that the references are not part of the record on appeal.

Rule 10(a)(b) of the Appellate Rules refers to the "record" on appeal as distinguished from the "appendix". Even if everything said in footnote two (2) of the Court's opinion concerning omissions, etc.,[1] were entirely correct, the Court overlooks the fact that Rule 10 deals with the "record" on appeal, not the "appendix". Moreover, the last sentence to the first paragraph of Rule 30(a) Federal Rules of Appellate Procedure provides

> The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Plaintiff recognizes that the Court is not obligated to refer to parts of the record that are not in the appendix, (See Local

[1] The court is actually referring to the "appendix" not the "record" as is stated in the opinion.

Rule 11(c)) but neither is it prevented from relying on parts of record that are not contained in the appendix. The truth of the matter is that the "record" on appeal contained the entire transcript while plaintiff's "appendix" contained selected portions of the transcript and other parts of the record.

Apart from what has been stated above and assuming everything that counsel has said thus far is wrong, and further assuming that Rule 10(b) is applicable herein to an appendix (which it is not), plaintiff did not "fail to comply" with said rule. Subdivisions (a) and (b) of Rule 10 requires inclusion of parts of the transcript in the "record" only when an appellant intends to urge that a ". . . finding or conclusion is unsupported in the evidence or is contrary to the evidence, . . ." Plaintiff's references to the "record" and the "appendix" were *not* for the purpose of urging that a finding or conclusion of the jury or the Court was unsupported in the evidence. Plaintiff's primary challenge on appeal was to the charge given to the jury by the Court. Plaintiff didn't have to refer to any portions of the evidence to argue that the Court's charge was incorrect as a matter of law. Conversely, if the jury charge was correct, there really would have been no further basis for challenging the finding of the jury which was supported at least by conflicting evidence. Thus, references to the "record" and "appendix" were made by plaintiff to demonstrate that there was sufficient evidence in the record *to withstand a directed verdict should the Court have concluded that the jury charge was incorrect as a matter of law*. Although the defendants never raised the issue of a directed verdict on appeal, plaintiff anticipated that they might have done so;[2] and the

[2] Defendants had moved for directed verdict in the lower Court and the District Court had reserved decision on said Motion. It is now settled law than an appellee can assert *any* ground in the appellate Court which can be a basis for supporting the judgment below. *See, Dandridge v. Williams*, 397 U.S. 471, 475 *at note* 6 (1970), *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975). Thus, it would have been proper for defendants to argue that even if plaintiff

Court certainly would have been justified, assuming it had ruled in plaintiff's favor on the jury charge issue, in looking *sua sponte* to the record to see if there was sufficient evidence to withstand a directed verdict against plaintiff. In deciding the directed verdict issue, however, this Court would have had to apply the very liberal standards of Rule 50 Federal Rules of Civil Procedure and refused to direct a verdict unless there could be but one reasonable conclusion as to the verdict. *See generally, 5A Moore's Federal Practice* ¶50.02 [1] at pp. 30-34 *et seq.* As stated above, plaintiff's references to the "record" and "appendix" were not for the purpose of urging that a finding or conclusion of either the jury or the Court was unsupported in the evidence but rather was for the purpose of demonstrating that there was sufficient evidence in the record to withstand a Motion for a directed verdict. Consequently, the particular provision of Rule 10 referred by the Court was not applicable herein.

Most important of all, however, is the fact that the Court states in footnote two (2) that on *at least* four (4) occasions, plaintiff referred to parts of the transcripts which are not part of the "record" (the "appendix") and then goes on to make extensive reference to particular citations and omissions from the "record". First, the *entire transcript* is in the "record" on appeal. Second, with respect to the "appendix" the Court is simply incorrect about plaintiff's omissions. There are no omissions from the "record" or the "appendix" as so stated by the Court. Plaintiff's references in its brief to the "record" and to the "appendix" are in accord with the Rule of Appellate Procedure. Rule 28(e) provides:

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prevailed on its legal claim with respect to the jury charge that the Court should sustain the judgment because there was insufficient evidence presented to withstand a directed verdict.

> References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) *shall be to the pages of the appendix at which those parts appear.* If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or *if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p.2, Transcript p.231. Intelligible abbreviations may be used.* If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected. (*Emphasis Added.*)

See also, Rule 32(a) for the informal renumbering of pages. With regard to the particular matters pointed out by the Court concerning plaintiff's brief the following should be noted: Footnote six (6) to plaintiff's brief contains, first, a reference to a part of the transcript which is part of the "record" and also part of the "appendix". It is correctly cited as A.392 (Appendix p. 392). Rule 28(e). The footnote then refers to a portion of the transcript which is part of the "record" but is *not* part of the "appendix". It is also correctly cited as T.184 (Transcript p. 184). *See* Rule 28(e). At footnote nine (9) of plaintiff's brief and with respect to other citations mentioned by the Court, plaintiff had correctly referred to the page of the *appendix* (i.e., "A" and the page number) where the citation could be found. The appendix page numbers are found at the *bottom* of each appendix page and are clearly identified as "A"

and then the page number. Everything cited by the plaintiff either in the "appendix" or the "record" was either in the appendix where so designated or in the record where so designated. There were no omissions as so stated by the Court. The only possible criticism of plaintiff's appendix is that the transcript page number found at the *top* of the appendix page (Rule 30(d), requires the transcript page number to *precede* the text) was not bracketed as required by said rule. But that is a far cry from accusing plaintiff's attorney of omitting portions of the record from the appendix and from accusing plaintiff's attorney of failing to comply with Rule 10(b).

In view of the above, it is understandable why the Court sets out such a one-sided statement of the evidence and goes on to state that there is "no evidence" (Slip Opinion at 4) to support plaintiff's claims.[3] Apparently, the Court never looked at or found the appropriate citations. Yet, the Court sets out defendant's contentions and citations to the transcript at length when in fact the defendant was the one that incorrectly cited by referring to *both* the transcript and the appendix when reference should have been to the appendix alone or the transcript and/or record alone. See, Rule 28(e).

Be that as it may, plaintiff does not expect the particular result herein to change because of what has been set out above. As stated previously, any attorney must be prepared to lose particular cases. But, it is particularly unfair and unjust to criticize an attorney for errors and omissions and make it appear that his presentation was sloppy and haphazard when in fact, it is the Court that has seriously erred. The result is particularly unfortunate and unjust when the opinion has already been published and widely circulated.

[3] There is ample evidence in the record to support a claim of purposeful discrimination and plaintiff can set it out in detail if necessary.

The Court's error on plaintiff's "omissions" from the record appears to have infected the entire opinion.[4] Nevertheless, plaintiff recognizes that cases must come to an end at some point. However, one passage in the Court's opinion is particularly disturbing. The Court writes:

> The trial judge was more than solicitous toward plaintiff, giving a charge based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973), to the effect that, should the jury find the defendant Taft considered impermissible factors in his promotional decision, the burden of proof would then shift to the defendant to show that he would have selected Maine irrespective of any political considerations.

McDonnell Douglas Corp. v. Green, supra (an employment discrimination case based upon Title VII 42 USC 2000 *et seq.*) was not relied upon by anyone below. The case is applicable to Title VII claims, not claims brought pursuant to 42 USC 1983. The jury charge was based upon holdings of the Supreme Court in *Arlington Heights v. Metro Housing*, 429 U.S. 252, 270 at *n.* 21 (1977) and *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 at 287 (1977). Rather than being "solicitous",[5] the District Court was following clearly applicable laws and properly charged the jury on this issue, assuming that the case was otherwise legally sufficient to go to the jury; an

[4] It appears that the Court's "no evidence" statement is based upon the Court's conclusions in footnote two (2) and follows throughout the entire opinion. Of course a reading of the entire record will reveal that there was ample evidence to support a claim of purposeful discrimination.

[5] This comment is particularly disturbing because the District Court was anything but solicitous toward plaintiff.

issue upon which the Court expresses "serious doubt" Slip Opinion at 5.[6]

[6] The Court also makes two other related statements on page 5 of the Slip Opinion:

> Since it is clear that appellant did not belong to any protected class, this jury instruction provided him more protection than he was legally entitled to.
>
> • • • • • • •
>
> DiPiro's protected interest is not of the same calibre as that of plaintiff's in *Elrod*. He had a protected interest in being allowed to compete for the position of fire chief. He was accorded this right.

It might be that these statements merely reflect the Court's disagreement with plaintiff's view that the defendant's actions implicated plaintiff's federal constitutional rights to equal protection of the law and in that case nothing more need be said. However, if the Court means that the rights being raised in *Elrod* were of a different "calibre" because they involved first amendment considerations while plaintiff's claim does not, then the Court's conclusion is questionable at best. Plaintiff's equal protection challenge was based upon purposeful discrimination (in the application of local laws and regulations) which *clearly implicated plaintiff's first amendment rights*. Plaintiff's claim was that the defendant Taft was proselytizing those in the merit system by conditioning advancement in employment upon political performance and political contributions, and that plaintiff was denied the promotion because he refused to become a political supporter; that Maine got the promotion because he was a political supporter. If plaintiff's contentions were correct, and there certainly was conflicting evidence on these points, then plaintiff's first amendment rights were clearly implicated. First Amendment rights are implicated as much where an action is taken against, or benefit denied, a person because of his political views as where an action is taken against or benefit denied a person because he refused to be proselytized and adhere to any particular political view, as is the situation in this case, see, e.g., *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *Elrod v. Burns*, *supra*; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In other words, *neutrality* is protected under the first amendment as well as partisanship when government benefits or penalties are at stake. Moreover, it is clear that first amendment rights can be raised in an equal protection context. *See*,

Plaintiff has already said too much, but the Court's opinion invites criticism. Since for all practical purposes, this Court's opinion will be the last word on this case, plaintiff's attorney should not have to suffer the Court's unjustified criticism and errors. Moreover, should plaintiff decide to ask the United States Supreme Court for review by way of certiorari, he should not have to knock down several straw men before identifying the *Elrod* and other constitutional issues of the case.

Plaintiff's attorney believes that everything he has said and stated herein is correct and that this Court was wrong in its opinion on several grounds. If it turns out that plaintiff's attorney's statements and contentions are incorrect then he apologizes to the Court in advance for what is unjustified criticism. If the Court agrees with plaintiff's contentions then he would ask the Court to withdraw its opinion and correct and/or modify its opinion at least to the extent that it would reflect the fact that plaintiff's attorney did not "fail to comply" with Rule 10(b), did not "omit" portions of the transcript

Williams v. Rhodes, 393 U.S. 23 (1968); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

Plaintiff has not formally petitioned for rehearing on any of these points because he cannot make the required statement pursuant to Local Rule 15 that his arguments have not been fully presented to the Court. However, if the Court's decision rests primarily upon the conclusion that no first amendment rights are implicated, the plaintiff would ask the Court to treat this Motion as a petition for rehearing and respectfully request this Court to reconsider its opinion in its entirety with supplemental briefing. Plaintiff cannot be faulted for not fully briefing an issue that had never been raised by the defendants either in this Court or the Court below.

from the record or for that matter from the appendix,[7] and that there was some evidence to support plaintiff's claim of purposeful discrimination.

Respectfully submitted,

RALPH J. GONNELLA
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316 Turks Head Building
Providence, Rhode Island 02903
(401) 272-0255

CERTIFICATION

I, hereby certify that a copy of the within Motion for Correction And/Or Modification of Opinion was hand-delivered to Joseph A. Kelly, Esquire, 326 Industrial Bank Building, Providence, Rhode Island, this 28th day of September, A.D., 1978.

RALPH J. GONNELLA

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[7] Moreover, for reasons previously stated, plaintiff has not designated this as a petition for rehearing. However, if the Court feels that the case requires reconsideration in light of what has been said herein by plaintiff, then plaintiff would ask the Court to treat this Motion as a petition for rehearing and give counsel an opportunity to submit supplemental memoranda on the issues addressed by the Court.

Appendix C.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 78-1087

PETER DiPIRO,
PLAINTIFF-APPELLANT,

v.

JAMES L. TAFT, MAYOR, CITY OF CRANSTON;
EARL CROFT, DIRECTOR OF PERSONNEL,
CITY OF CRANSTON;
THOMAS POWERS,
DEFENDANTS-APPELLEES.

Order on Motion for Correction and/or Modification of Opinion

Entered October 20, 1978

Before Coffin, Chief Judge,
Campbell and Bownes, Circuit Judges.

It is difficult for the court to understand an appellant's submitting an Appendix of two volumes and omitting from it

those portions of the record (total of three volumes) that are cited specifically in his brief in the light of our Local Rule 11(c) which provides: "Notwithstanding the provisions of FRAP Rule 30 the court may decline to refer to portions of the record omitted from the Appendix, except by inadvertence, unless leave be granted prior to argument."

We will, however, eliminate footnote 2 from the published opinion.

The balance of the motion is merely a repetition of appellant's position and we see no need to modify the opinion in any way.

By the Court,

s/ DANA H. GALLUP,
Clerk.

Appendix D.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF RHODE ISLAND

PETER DiPIRO
VS. C.A. No. 75-0064
JAMES L. TAFT, ET AL

Motion for Allowance of Attorney's Fees and Costs

Now come the defendants in the above-captioned cause pursuant to Rule 54(d) and moves for allowance of attorney's fees and costs all in accordance with the aforementioned Rule and 42 U.S.C. 1988 more particularly described in the memorandum attached hereto and made a part hereof.

JOSEPH A. KELLY
326 Industrial Bank Bldg.
Providence, Rhode Island

CERTIFICATION

I hereby certify that on this 2nd day of October A.D., 1978 I mailed a true copy of the within motion to Ralph Gonnella, Esquire, 808 Union Trust Building, Providence, Rhode Island.

JOSEPH A. KELLY
